

IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

Court's order whether the case is or not approved for reporting

(Chapter VIII, Rule 32(2) (b))

Description of Case

Criminal Appeal No.1064/2001

WITH

Criminal Appeal No.1065/2001

Date of decision :-09.08.2005

A.F.R. (Approved for reporting)

~~Not approved for reporting~~

Date :- 09.08.2005

Initials of Judge

Note :- Bench Reader will attach this at the top of first page of the judgment when it is put up before the Judge for signature.

IN THE HIGH COURT OF UTTARANCHAL
AT NAINITAL

CRIMINAL APPEAL NO.1064 of 2001
(old number 870 of 1981)

Arbinder Singh S/o Jagat Singh
R/o Patti Karumpur P.S.Swar
district Rampur Appellant
Versus

State of Uttaranchal Respondent

WITH

CRIMONAL APPEAL NO. 1065 OF 2001
(old number 752 of 1981)

Arbinder Singh S/o Jagat Singh
R/o Patti Karumpur P.S.Swar
district Rampur Appellant
Versus

State of Uttaranchal Respondent

Mr.M.S.Pal learned counsel for the appellants assisted by Mr. Diwakar
Chamoli
Mr. M.A.Khan AGA for the State.

Hon'ble J.C.S. Rawat, J.

1. These two criminal appeals were filed against the same judgment and order dated 13.3.1981 passed by Sri M.C.Jain the then I Addl. Sessions Judge, Nainital in S.T. No.295 of 1979 State Vs. Arbinder Singh and 5 others, therefore, these two appeals are being disposed of by this common judgment. The learned Addl. Sessions Judge convicted and sentenced the appellant Arbinder Singh to undergo R.I. for a period of four years under section 395 IPC. The learned trial court acquitted the co-accused, namely, Munsiram, Amar Chand, Deewan Chand, Gopal Chand and Mugla Ram.

2. The prosecution case, in brief, is that on 5/6.7.1979 Ranjeet Singh Rawat (PW1) Range Officer of Forest at Ramnagar alongwith Kirti Singh Bist (PW2) Forester, Kushal Singh (PW3), forest guard and other forest personnel were on patrolling duty in the forest Jungle. They stopped tractor no. USR 5958 driven by the appellant. Munshi Ram accused was sitting on the mudguard. Munshi Ram shot fire from the rifle. The remaining accused were sitting in the trolley. Kriti Singh Bisht (PW2) snatched the rifle from Munshi Ram. The appellant was arrested on the spot while the other accused made their escape good. 25 logs of wood of the value of Rs.10,000/- were recovered from the trolley. The appellant alongwith the recovered wood were brought to the office of the forest department and Fard (Ex.Ka.2) was prepared in the office and the recovered wood was given in the superdigi vide superdiginama (Ex.Ka.3). Written report (Ex.Ka1) was submitted at P.W. Ramnagar on 6.7.1979 at 8.30 p.m. On the basis of written report FIR (Ex.Ka4) was prepared and a case was registered in G.D (Ex.Ka5). S.I.Mathura Prasad (PW4) conducted the investigation and prepared site plan (Ex.Ka6). Thereafter the investigation was conducted by S.O.Sher Pal Singh (PW5) who after completing the investigation submitted charge sheet(Ex.Ka8) against the appellant and other co-accused.

3. Charge was framed against the appellant u/s 395 IPC to which he pleaded not guilty and claimed to be tried.

4. The prosecution in support of its case examined PW-1 Ranjit Singh Rawat, PW2 Kirti Singh Bist, PW3 Kushal Singh who are the forest personnel and witnesses of fact. PW4 S.I.Mathura Prasad Juyal and PW5 S.O. Sher Pal Singh conducted the investigation.

5. In the statement recorded u/s 313 Cr.P.C. the appellant denied the prosecution case and stated that he has falsely implicated in this case due to enmity.

6. The learned trial court after appraisal of the evidence on record found the appellant guilty and convicted and sentenced the appellant as mentioned above.

7. I have heard the learned counsel for the parties and perused the evidence on record.

8. The learned counsel for the appellant contended that the prosecution has failed to prove its case beyond all reasonable doubt and there was enmity between the personnel of the forest department and Gyan Chand and his party. It was further contended that the forestland was allotted to them in the past and the government regularized the land but due to the enforcement of the Indian Forest act the land could not be settled with them. As such the forest department officials had an ill will against the appellant and co-accused.

9. At the outset it is to be noted that only the appellant has been convicted u/s 395 IPC and the rest of the five accused had been acquitted by the learned trial court. The prosecution in its evidence adduced the

evidence of PW1 Ranjit Singh Rawat who was the forest ranger. He alongwith PW2 Kirti Singh Bist, PW3 Kushal Singh and other forest personnel were on patrolling duty in the forest are in the fateful night. He narrated the entire prosecution story as mentioned in para no.2 of this judgment. According to him the patrolling party while on way saw a tractor coming from the opposite side to which the appellant was driving. Munshi Ram was sitting on the mudguard. The patrolling party stopped the tractor. Munshi Ram fired from the riffle. None of the forest personnel sustained rifle injury. Kirti Singh PW2 snatched the rifle from Munshi Ram. The appellant was arrested on the spot where the remaining accused managed to escape good. The forest officials took the tractor trolley alongwith the appellant and recovered article to their office at Ram Nagar from where report Ex.Ka1 was sent to police station. Superdinama Ex.Ka2 of wood was prepared and it was given in the superdigi of the forest department as per the evidence of the prosecution. It is also in evidence that the appellant was brought to the police station and a report was lodged there. PW2 Kirti Singh Bist and PW3Kushal Singh who are the forest guard are the witnesses of fact and who were in the raiding party stated the above facts in their evidence and they supported the evidence of PW1 Ranjit Singh Rawat. The prosecution adduced the evidence of S.I. Mathur Prasad Juyal PW4 and S.O. Sher Singh PW5 who conducted the investigation.

10. At the out set I would like to mention here that the trial court acquitted 5 accused and convicted only the appellant u/s 395 IPC. The perusal of section 395 IPC reveals that it is mandatory that there must be 5 or

more persons to commit the robbery. Meaning thereby there must be 5 or more persons and injuries should have been caused to the injured. If five persons have been acquitted and only one person cannot be convicted u/s 395 IPC.

11. It has been held in **Ram Shankar Singh & others Vs. State of U.P. 1956 S.C. 441(S) AIR V 43 C 77 June** that in any event, the three remaining accused persons could be convicted of the lesser offence of robbery under Section 392 I.P.C., if there was evidence to show that they had committed acts of theft and used violence while committing the theft.

12. It has further been held that **Anshad & others Vs. State of Karnataka 1994(4) SCC p/381:-**

“16. Indeed with the acquittal of A-4 and A-5, the conviction of A-1, A-2 and A-3 for an offence under section 396 IPC cannot stand because the number of accused would in that case be less than five. However, the evidence on record does show that all the three accused A-1, A-2 and A-3 are responsible for the murder of Savitri Devi and Sunil as also for committing robbery and theft of the articles belonging to the deceased in the manner suggested by the prosecution. No challenge to the recovery of the ornaments and other articles was made and rightly so, in the face of cogent, reliable and positive evidence produced by the prosecution. The appellants A-1 to A-3 in our opinion can safely be convicted for an offence under sections 302/34 IPC read with section 394/34 and 379/34 IPC. We

accordingly modify their conviction in the manner noticed above.”

13. In view of the above I am of the view that the appellant can only be convicted u/s 379 IPC instead of section 395IPC.

14. The learned counsel for the appellant further contended that there was inordinate delay in lodging the FIR. The incident took place in between the night of 5/6.7.1979 at about 2 or 3 o'clock. The report of the incident was lodged on the next day at about 8.30 p.m. The distance between the place of occurrence and the police station is 18 kilometers. It has come in the prosecution evidence that when the raiding party came from the forest, police check post Perumadar fell in between the office and the place of occurrence. It was further contended that the forest department has not lodged the report before police check out post Peerumdar. The learned AGA refuted the contention. The lodging of the FIR in a case of theft or in any other case is very important. If it is proved to the satisfaction of the court that the delay is properly explained in that case the delay is not fatal to the prosecution case. Each case is to be judged on its own facts and attending circumstances of the case. In this case, it is admitted that the appellant was arrested on the spot. It has come in evidence that after the arrest of the appellant they went to the place of incident where the forest officials made an enquiry. Thereafter the tractor trolley was brought to the office of the forest and a report was lodged. This fact cannot be ignored that the forest department is a government department and it moves slowly but at the same time the forest department had

the power to take the cognizance of the offence u/s 26 of the Forest Department or to sent it to the police. After taking the decision the FIR was lodged. The delay in lodging the FIR has been satisfactorily explained and it is not fatal to the prosecution. I am in complete agreement with the findings of the learned trial court in this regard.

15. It was further pointed out by the learned counsel for the appellant that the name of Kushal Singh PW3 was not mentioned in the FIR that he was present at the spot. It was further pointed out that there was no source of light. It was further pointed out that the FIR does contain the source of light, i.e. torch. Learned AGA refuted the contention. Whereas the source of light is concerned, it may be mentioned here that the appellant was arrested on the spot. The source of light loses its importance. As far as the name of PW3 Khushal Singh is concerned the FIR is not the encyclopedia of each and every detail, which is taken place at the place of incident. If the genesis of the incident has been incorporated in the FIR, it is sufficient for the police to start the investigation. The Hon'ble Apex Court has held in **Bhagwan Singh and others, Vs. State of M.P. 2002 SCC (Cri) 736 :-**

“13. We also do not find any substance in the submission of the learned counsel for the appellants that statement of Kiran (PW7) should not be given any weight because her name is not mentioned in the FIR. There is no requirement of law for mentioning the names of all the witnesses in the FIR, the object of which is only to set the criminal law in motion. Kiran (PW7) herself was injured

and being the niece of Hari Ram (deceased) had no reason to involve innocent persons in the commission of the crime. Merely because PWs 7, 12 and 22 happen to be the relations of the deceased, cannot be made a ground to discard their evidence. In the circumstances of the case, the High Court has rightly found the aforesaid witnesses to be natural witnesses of the occurrence.”

In view of the above discussion I am in complete agreement with the findings recorded by the learned trial court.

16. The learned counsel for the appellant contended that the report does not bear the date at its top. The FIR was written at 8.30 p.m. and the GD has also been recorded at that time. In view of the fact that this fact has become insignificant because the time has been indicated in the report and in the GD itself.

17. The learned counsel for the appellant further contended that the recovery was not prepared at the spot and no recovery has been made from the person of the appellant. The learned AGA refuted the contention and contended that Ex.Ka2 Fard is the sufficient proof of the factum of recovery and it is not essential that the recovery memo should be prepared at the spot. The prosecution evidence with regard to the recovery of the tractor, its trolley and logs is cogent and credible. There is no question to plant such recovery. It is well settled position of law that even if the recovery memo has not been prepared on the spot or there is irregularity in the recovery memo it does not become ipso facto illegal. Although a search is illegal

by reason of non-compliance with the provisions of section 100, the evidence discovered by the search is not inadmissible. What would otherwise be relevant will not become irrelevant or inadmissible because it was discovered in the course of an illegal search. Therefore, the evidence got by illegal search is not to be discarded but may be considered. In dealing with the evidence of a search which is illegal, the court would have to examine the evidence very carefully, eliminate the possibility that the search may have been result of private malice, and then decide whether the search and the evidence relating to the discovery of incriminating material has been proved beyond and reasonable doubt. But it would be going too far to hold that only because the search is illegal, the accused must be acquitted. It may be that where the provisions of section 100 and 165 are contravened, the search can be resisted by the person whose premises are sought to be searched. It may also be that, because of the illegality of the search, the court may be inclined to examine carefully the evidence regarding the seizure. But beyond these two consequences, no further consequence ensues, and the seizure of the articles is not vitiated. The failure to comply with the provisions regulating searches may cast doubt upon the *bona fides* of the officers conducting the search. But, when once the evidence of the search witnesses has been believed, it is obviously no defence to say that the evidence was obtained in an irregular manner. There is nothing in the law, which makes such evidence inadmissible. Non-compliance with the provisions of sections 100 and 165 would be a mere irregularity and would not vitiate the trial. In this case the Fard Ex.Ka2

is on record. The contention of the learned counsel for the appellant has no weight.

18. The learned counsel for the appellant further contended that the appellant was ploughing his field at the time of arrest and the raiding party arrested him from the field and further contended that a false recovery has been shown against the appellant. It was suggested to PW1 Ranjeet Singh that actually the appellant was ploughing his field by tractor and then they caught hold of him and he took him to the police station alongwith his gun to implicate him in a false case. The statement of the appellant was recorded u/s 313 Cr.P.C.. He had not stated in his statement how he was arrested. The occurrence took place in between the night of 5/6.7.1979 at about 2 or 3 o'clock and the report was lodged on the next day at about 20.30 o'clock. The appellant remained in the custody of the forest personnel for a long time. In case he would have been arrested in the manner as suggested by the appellant some one from his family would have informed the authority concerned about the high-handedness of the forest personnel and they would have taken effective steps to release the appellant. No such paper has been filed. The theory as suggested by the defence is an afterthought and has only been developed to save him from the consequences of criminal act. The learned counsel for the appellant further pointed out that the letter was written by the District Magistrate in which it was mentioned that the land belongs to Gyan Chand and his party. This document does not help the defence. This paper is not connected to the appellant. None of the eye-witness produced in his case had any enmity direct or indirect

against the appellant. None of the papers filed by the defence relates to the present appellant. It is not for the forest personnel to plant such a huge recovery against the appellant. From the perusal of the evidence on record it reveals that the appellant was arrested on the spot as has been proved by the prosecution and an afterthought theory has been developed by the defence in a vague attempt to defeat the justice.

19. The learned counsel for the appellant contended that there are certain contradictions in the testimony of prosecution witnesses. I have gone through the contradictions which are of minor in nature and do not disturb the genesis of the case. It was further pointed out that there are inconsistencies in the statements of the eye-witnesses with regard to the information given to the forest staff. It was further pointed out that there are some contradictions with regard to the fact as to which forest personnel of the raiding party recorded the information from the informant with regard to the appellant that he was carrying the Khair logs in his tractor trolley from the forest or not and as such the testimony of the witnesses is liable to be rejected. It is in the evidence that the raiding party got the information that the appellant was carrying Khair logs from the forest by the forest personnel. As such there is no contradiction in the statements of the prosecution witnesses.

20. It was further pointed out that the injuries on the person of the appellant have not been explained by the prosecution. It is also in the evidence of the prosecution that one of the accused who has been acquitted fired upon the forest officials and they

apprehended the accused. In such arrest the appellant sustained the injuries. As such, the injuries on the person of the appellant have satisfactorily been explained. The contention of the learned counsel for the appellant has no force.

21. The learned counsel for the appellant submitted that the appellant is aged about 65 years old and the value of the property seized was Rs.10,000/- at the time of the occurrence. It was further pointed out that the incident took place in the year 1979. On 11.8.1980 at the time of recording of statement of the appellant u/s 313 Cr.P.C. was about 40 years. Thus the age of the appellant comes to about 65 years as on today. The learned counsel for the appellant contended that the appellant may be sentenced to the period already undergone by him. The learned AGA submitted that as per the record the appellant was in Jail for the period from 7.7.1979 to 8.10.1979 and from 13.3.1981 to 5.5.1981. Thus the appellant remained in Jail for more than four months. Keeping in view the age of the appellant, the date of the incident and the value of the property the appellant may be sentenced to undergo four months imprisonment and a fine of Rs.5000/- u/s 379 IPC instead of section 395 IPC.

22. The appeal is partly allowed. The conviction and sentence awarded against the appellant by the trial court u/s 395 IPC per judgment and order dated 13.3.1981 are set aside. But, the appellant is convicted u/s 379 IPC instead of section 395 IPC and sentenced to the period already undergone by him and a fine of Rs.5000/- payable within two months. In default of

payment of fine the appellant shall undergo further imprisonment of one month.

23. Let the record of the court below be sent back immediately for compliance. Compliance report be submitted within three months.

(J.C.S. Rawat, J)

Dated :- August 09, 2005
MPS